

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RAMON MENDOZA</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,033
<b>NATIONAL BEEF PACKING COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>WAUSAU UNDERWRITERS</b>	)	
Insurance Carrier	)	

**ORDER**

The application of claimant for review by the Workers Compensation Appeals Board of the Award issued by Assistant Director Brad E. Avery on October 7, 1997, came on before the Workers Compensation Appeals Board.

**APPEARANCES**

Claimant appeared by and through his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, James H. Morain of Liberal, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations as specifically set forth in the Award of the Assistant Director are herein adopted by the Appeals Board.

**ISSUES**

What, if any, is the nature and extent of claimant's injury and/or disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant originally suffered accidental injury while working for respondent in February 1992 with injuries to his left upper extremity, shoulder, and right wrist. Claimant was diagnosed at that time by Dr. Ernest R. Schlachter with overuse syndrome, rotator cuff tendonitis, impingement syndrome of the left shoulder girdle, and carpal tunnel in the right wrist. Claimant settled that case based upon a 12 percent permanent partial disability to the body as a whole and returned to work for respondent.

In January 1995 and continuing through February 20, 1996, claimant began experiencing problems in his right upper extremity. Claimant was again examined by Dr. Schlachter who diagnosed overuse syndrome and rotator cuff tendonitis of both shoulders and overuse syndrome of both upper extremities with prior right carpal tunnel syndrome. He had assessed a 10 percent functional impairment to the left upper extremity in 1993 and advised no change in the impairment of function to the left upper extremity or shoulder as compared to the 1993 examination. He assessed an additional 10 percent functional impairment to the right upper extremity as a result of the injury suffered from January 1995 through February 20, 1996.

The Assistant Director found claimant suffered a scheduled injury as a result of the most recent injuries with respondent. This decision was based upon the uncontroverted testimony of Dr. Schlachter that claimant had suffered no additional functional impairment to the left upper extremity beyond that experienced in 1993. This opinion of Dr. Schlachter was contained both in his April 15, 1996, report which is marked as Exhibit 1 to his deposition and in the deposition testimony of Dr. Schlachter. As indicated above, Dr. Schlachter is the only health care provider to testify in this matter and his testimony is uncontradicted. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146(1976).

Claimant alleges simultaneous aggravation pointing to the fact that he experienced symptomatology to the left upper extremity during the time the right upper extremity was suffering injury.

Scheduled injuries for shoulders are set forth in K.S.A. 44-510d(13) which provides that compensation for loss of an arm, including the shoulder girdle, shoulder joint, shoulder musculature, or any other shoulder structures shall not exceed 225 weeks. This amendment to the statute was held to be constitutional by the Kansas Supreme Court in Injured Workers of Kansas v. Franklin, 262 Kan. 840, 942 P.2d 591 (1997).

K.S.A. 44-510c(a)(2) combines scheduled injuries and requires in certain instances that they be treated as whole body permanent total disabilities rather than as scheduled injuries. K.S.A. 44-510c(a)(2) has been extended to allow compensation for certain combined injuries based upon permanent partial disability. See Murphy v. IBP, Inc., 240 Kan. 141, 144, 727 P.2d 468 (1986). In Murphy the Supreme Court held that simultaneous aggravation to both arms and hands through repetitive use removes the disability from a scheduled injury and converts it to a general disability. The rules set forth in Murphy were reaffirmed by the Kansas Supreme Court in Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, \_\_\_ P.2d \_\_\_ (1997).

In Depew the Supreme Court found that claimant had suffered simultaneous aggravation to her upper extremities and awarded a whole body disability. However, in the present case the only medical evidence in the record, that of Dr. Schlachter, is that claimant suffered no additional impairment to the left upper extremity as a result of the 1995 and 1996 incidents. Therefore, claimant has not proven by a preponderance of the credible evidence that he meets the criteria set forth in K.S.A. 44-510c or in Murphy which requires that claimant suffer simultaneous aggravation to his upper extremities in order to be awarded a percentage of disability to the body as a whole under K.S.A. 44-510e.

As such, the Appeals Board finds that the opinion of the Assistant Director awarding claimant a 10 percent functional impairment to the right upper extremity as a result of the injuries suffered from January 1995 through February 20, 1996, should be affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated October 7, 1997, should be, and is hereby, affirmed and an award is granted in favor of the claimant, Ramon Mendoza, and against the respondent, National Beef Packing Company, and its insurance carrier, Wausau Underwriters, for an injury occurring through February 20, 1996.

Claimant is entitled to 22.5 weeks permanent partial disability compensation at the rate of \$291.86 per week for a total award of \$6,566.85 for a 10% loss of use of the right upper extremity including the shoulder, all of which is due and owing, minus any amounts previously paid at the time of this award.

Pursuant to K.S.A. 44-536, claimant's contract of employment with his counsel is approved.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Underwood & Shane	
Transcript of Regular Hearing	\$159.50
Kelley York & Associates, Ltd.	
Deposition of Ernest Schlachter, M.D.	92.50
Deposition of Karen Terrill	121.45

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1998.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c:   Lawrence M. Gurney, Wichita, KS  
      James H. Morain, Liberal, KS  
      Kenneth S. Johnson, Administrative Law Judge  
      Philip S. Harness, Director